No. 15-474

IN THE

Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DANIEL I. WEINER
BRENT FERGUSON
BRENNAN CENTER FOR JUSTICE AT THE N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(646) 292-8383

SCOTT A. EISMAN
Counsel of Record
MADELINE R. SNIDER
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 230-4635
scott.eisman@freshfields.com

Attorneys for Amicus Curiae Brennan Center for Justice at N.Y.U. School of Law

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INTEREST OF THE AMICUS CURIAE[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, nonpartisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy. The First Amendment arguments raised by petitioner Robert McDonnell and certain *amici* implicate core parts of this mission. To assist the Court's analysis of these vital issues, the Brennan Center respectfully submits the annexed brief *amicus curiae*.

SUMMARY OF ARGUMENT

The First Amendment stands as the foremost protector of American democracy, ensuring the free exchange of ideas in order to preserve a government in which elected officials act in the interest of the people. But Governor McDonnell invokes the First Amendment for a different purpose: to shield himself from punishment for accepting more than $175,000 in

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than amicus, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

Petitioner and the Government have both given blanket consent to the filing of *amicus* briefs.

cash, luxury vacations, expensive shopping sprees, and other gifts from a wealthy businessman in exchange for using his office to advance his benefactor's personal business interests. In the topsy-turvy universe that McDonnell and some of his *amici* inhabit, what he did was no different from a politician's accepting a "school baseball cap," a "personalized plaque," or a "complimentary lunch," and thus deserves First Amendment protection. The democracy they have in mind is not one that those who adopted the First Amendment would recognize. We write solely to respond to the argument that the First Amendment protects McDonnell's self-dealing behavior, and express no view on any other issue before the Court.

McDonnell's First Amendment argument relies on a misunderstanding of this Court's rulings in *Citizens United v. FEC* and *McCutcheon v. FEC*. Those cases invalidated campaign-finance limits that, in the Court's view, targeted nothing more than the general "ingratiation and access" that a "constituent" might hope to secure as a byproduct of her campaign spending, given that "constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

In neither case did this Court hold that an elected official has a constitutional right to use his office to promote a financial supporter's private business goals in exchange for money. Such a holding would call into question the government's authority to ensure the integrity of the electoral process, which this Court has repeatedly described as a government interest of the highest order. Those rulings recognized that repre-

sentative democracy cannot function if elected leaders put their own interests, or those of personal benefactors who have given them large sums of money, ahead of the public interest—or if the public even perceives them as doing so. Holding that the government is powerless to address McDonnell's self-dealing behavior would sunder the First Amendment freedoms he invokes from their very reason for being: government by the people.

ARGUMENT

I. This Court's Campaign-Finance Jurisprudence Does Not Compel a Ruling for McDonnell.

McDonnell points to language in this Court's recent campaign-finance cases indicating that mere "ingratiation and access" are not corruption, and seeks to label his actions no more than "ordinary" politics protected by the First Amendment. Pet. for Cert. 27. In doing so, McDonnell misses the thrust of those cases, which focused on the general access and influence that campaign spending may secure for those who have expressed support for a candidate's "beliefs and interests." *McCutcheon*, 134 S. Ct. at 1441. Even as it made this point, the Court reaffirmed that actually trading "dollars for political favors" is classic corruption, which the state has a vital interest in preventing. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). The Court has never suggested that such corruption does not include facilitating access to subordinate decision-makers in an effort to persuade them to further a contributor's private financial interests in exchange for money. That such actions would oth-

erwise be legal is irrelevant; the same is true for most actions that officials take in exchange for bribes. The Court cannot weigh McDonnell's acts in isolation from the gifts and money he received. Taken together, his conduct constitutes the sort of corrupt behavior that the government has every right to sanction.

A. "Ingratiation and access" under recent campaign-finance law refers only to general ingratiation, not the specific actions for private benefit at issue here.

To begin with, the Court has never held that a public official's efforts to influence *others* subject to his direct or indirect authority—including by arranging meetings with these subordinates—cannot constitute prohibited corruption.

Citizens United and *McCutcheon* contemplate that candidates might feel "general gratitude" toward those who engage in supportive political spending. But that reasoning sanctions only the "generic favoritism or influence" that may result from the candidates' appreciation—not the sort of direct benefits the jury found McDonnell provided. *See Citizens United*, 558 U.S. at 359; *McCutcheon*, 134 S. Ct. at 1441; Gov't Br. 2–11. The Court has said that, unlike "dollars for political favors," general favoritism represents a natural and inevitable byproduct of political speech: "the ultimate influence" that democratic participants have "over elected officials." *Citizens United*, 558 U.S. at 360.

In *Citizens United*, the Court suggested that the government could not outlaw corporate independent expenditures, because the absence of "prearrangement and coordination" with the candidate meant that generic favoritism was the most that would usually result from such spending. *Id.* at 345 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)). The plurality in *McCutcheon* reached the same conclusion concerning aggregate limits on how much an individual may contribute to all candidates, parties, and PACs, reasoning that a candidate or officeholder is unlikely to show more than generic favoritism to a donor who makes a contribution not specifically "directed, in some manner, to [the] candidate or officeholder." 134 S. Ct. at 1452 (internal quotation marks omitted). Thus, while it struck down aggregate limits, the Court left undisturbed base limits on how much an individual may contribute to a specific candidate, party, or PAC. *Id.* It did not contemplate a circumstance in which political spending leads to more than merely general "ingratiation and access."

This case involves a wealthy patron's personal gifts, not campaign spending, making any First Amendment interest far more attenuated. Gov't Br. 27; Pet. App. 64a (Fourth Circuit opinion). Insofar as campaign spending implicates the First Amendment, it does so because it is an exercise of the right to participate in the democratic process. *See McCutcheon*, 134 S. Ct. at 1440–41. Personal gifts and loans, by contrast, are not fundamental to the exercise of the right to democratic participation. Indeed, one commentator suggests that *Citizens United* and *McCutcheon* "should be understood as saying not that the [First] Amendment protects influence and access,

but that it protects campaign-related activities, for example, independent expenditures that yield influence and access." George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich, McDonnell, *and the Criminalization of Politics*, 91 Notre Dame L. Rev. 177, 186 (2015).

In any event, McDonnell did much more than practice general favoritism. As explained below and by the Government, the jury found that he did not merely agree to meet with Jonnie Williams, but instead promised to use the Governor's office to influence and facilitate access to other decision-makers over whom he had authority in order to induce them to take specific actions that would benefit Williams and his company, Star Scientific. *See* Part I(B) *infra*; Gov't Br. 2–11. While we do not opine on the legality of McDonnell's conviction for the particular statutory offenses at issue here, such a bargain is precisely the sort of "dollars for political favors" exchange that the Court has called "[t]he hallmark of corruption." *Citizens United*, 558 U.S. at 359 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). "Democracy is premised on responsiveness," *id.* (internal quotation marks omitted), but "responsiveness" does not mean renting out the prestige and authority of one's office to highest bidder. Preventing such dealings—or even their appearance—has always been and continues to be a compelling governmental interest. *See McCutcheon*, 134 S. Ct. at 1441.

B. The Court must weigh both McDonnell's actions and the payments he received, and cannot consider the former in isolation from the latter.

McDonnell's receipt of luxury gifts and loans in exchange for political favors is textbook corruption. He and his *amici* do not dispute the jury's findings regarding the money and gifts that went to him and his family; they simply want the Court to ignore these facts and instead focus entirely on the propriety of the favors he offered in return. *See, e.g.*, Pet'r Br. 43–50; Br. of Former Federal Officials as *Amici Curiae* ("Fed. Official Br.") 5. But McDonnell's actions on behalf of Williams and Star Scientific cannot be evaluated in isolation from what he received in exchange. Indeed, the vast majority of corrupt exchanges involve action by the official (e.g., introducing legislation, making a political appointment) that is itself perfectly legal. If such an exchange is not "corrupt" for First Amendment purposes, then corruption is an empty letter.

To briefly review: The arrangement between McDonnell and Williams began in October 2010, when, during a six-hour ride on Williams's private plane, Williams explained "what [he] needed from [McDonnell]": extensive testing of Star Scientific's supplement Anatabloc at Virginia universities to help persuade the FDA to approve it as a pharmaceutical. Pet. App. 7a; Gov't Br. 2–3.

Over the next two years, Williams shelled out more than $175,000 in cash and luxury goods for

McDonnell and his family These expenditures (almost all of which were hidden) included:

- two $50,000 "loans" in response to a request to assist the McDonnells with their financial troubles, which were never repaid, Pet. App. 9a, 15a–16a;
- a $15,000 check for the catering bill at the wedding of one of McDonnell's daughters and a $10,000 wedding gift for a second daughter, Pet. App. 9a, 20a;
- golf outings for McDonnell and his family—which Williams did not join—at a cost of over $5,000, Pet. App. 10a, 13a, 15a;
- multiple vacations on Williams's dime at his property in Smith Mountain Lake, Virginia, and at a luxury resort in Cape Cod, Massachusetts, Pet. App. 11a–12a, 19a;
- high-end consumer goods, including a $20,000 shopping spree at Bergdorf Goodman for McDonnell's wife Maureen on the same day Williams attended a political rally alongside the couple, and a $6,000 Rolex watch for McDonnell, at his wife's request, Pet. App. 7a–8a, 13a.

In exchange for these benefits, McDonnell sought to give Williams exactly what Williams had said he "needed," throwing the weight of his office behind Anatabloc and pressuring his subordinates to do the same. The jury found that there had been a quid pro quo; indeed, Mrs. McDonnell told Williams, "The Governor says it's okay for me to help you but I

need you to help me." Pet. App. 9a; *see also* Gov't Br. 2–11.

These facts do not square with the language McDonnell and *amici* invoke from this Court's campaign-finance cases. His extraordinary product-peddling was not an expression of "general gratitude" to a political supporter, but a concerted effort to advance the financial interests of Williams and Star Scientific in exchange for cash, vacations, and luxury goods. Such behavior is quite far removed from the "pedestrian stuff of elected office," such as posing for photos or sending invitations to fundraisers. Pet'r Br. 50; *see also* Fed. Official Br. 9; Br. of *Amici Curiae* 77 Former Attorneys General (Non-Virginia) ("AG Br.") 4–5.[2] And $175,000 in cash and luxury gifts is hardly the equivalent of a "school baseball cap," "commemorative plaque," or "complimentary lunch." *See* Fed. Official Br. 15–16; AG Br. 3–4.

In short, "*McDonnell* seems like a strange case to take a stand against the 'criminalization of politics.' The Governor and his family received extraordinary

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[2] In this regard, McDonnell's invocation of this Court's partially overruled decision in *McConnell v. FEC* falls short. *See* Pet'r Br. 41–42. First, McDonnell cites a portion of the decision upholding McCain–Feingold's ban on political parties raising soft money, *which is still good law*. *See* Pet'r Br. 41 (citing *McConnell v. FEC*, 540 U.S. 93, 130 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 153 (D.D.C.) (three-judge court), *aff'd*, 561 U.S. 1040 (2010). Second, McDonnell did much more than simply "peddle access" to himself; he agreed to take steps to shape government policy for a personal benefactor. In other words, he engaged in the "sale of actual influence," which, he concedes, the government has the power to sanction. *See* Pet'r Br. 41 (internal quotation marks omitted).

largesse from a donor who wanted to do business with the state." Brown, *supra*, at 227 Without regard to whether the Court finds McDonnell broke federal law, to suggest that his actions are entitled to First Amendment *protection* would alter the ethical standards of our political system beyond recognition.

II. Holding that McDonnell's Actions Enjoy First Amendment Protection Would Make It Impossible to Protect Electoral Integrity.

If this Court holds that McDonnell's conduct enjoys First Amendment protection, it will call into question the government's ability to protect the integrity of the electoral process, thus undermining the very First Amendment freedoms that McDonnell and his *amici* invoke.

We live in a representative democracy, the survival of which depends on a political process controlled by the people. The Constitution embodies the principle that elected officials serve as "agents and trustees of the people," with "ultimate authority, wherever the derivative may be found, resid[ing] in the people alone." *The Federalist* No. 46 (James Madison). As Governor, McDonnell performed all the functions of his office as a "trustee for his constituents, not as a prerogative of personal power." *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)).[3]

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[3] McDonnell's conduct most closely resembles the lavish personal gift-giving to officials that was common in eighteenth-century European absolute monarchies, whose political practices the

The electoral process is a linchpin of this system, and ensuring its integrity is a "broad" and "compelling" governmental interest. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (Stevens, J., controlling opinion); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Almost 60 years ago, in an early campaign-finance case, the Court described the "integrity of the electoral process" as "basic to a democratic society." *United States v. Int'l Union United Auto., Aircraft & Agricultural Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 570 (1957). It more recently noted that "[c]onfidence in the integrity of the electoral processes is essential to the functioning of our participatory democracy," and may even justify a range of measures that burden "fundamental political right[s]," like voting. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (upholding voter-ID requirements).[4]

The concern for electoral integrity is rooted in the First Amendment, not antagonistic to it. The First Amendment protects the political voice of the American people. Its drafters believed "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 377 (1927)

Framers self-consciously condemned and rejected. *Cf., e.g.*, Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to* Citizens United 25–28 (2014).

[4] *Accord Doe v. Reed*, 561 U.S. 186, 197 (2010) (disclosure requirements); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (contribution limits); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (ballot-access restriction); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (party-registration restriction).

(Brandeis, J., concurring), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). In a democracy, political speech is particularly vital as a mechanism for ensuring the accountability of officials to the electorate. *Citizens United*, 558 U.S. at 339.

First Amendment freedoms thus operate in tandem with the electoral process. Both guarantee that government will be responsive to the public's views and interests. *See* Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* 13 (2014). The two mechanisms actually depend on each other. Just as the electoral process requires robust political debate, the "free marketplace of political ideals," in which such debate takes place, requires reliable elections through which citizens can translate their views into government action. *Id.* at 62–63.[5]

Broad anticorruption measures are important safeguards for this system, designed to protect electoral integrity by ensuring that elected officials act on behalf of their constituents rather than for their own personal benefit. This Court has long understood political corruption to be a threat to the integrity of our system of representative democracy, *Buckley*, 424

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[5] Of course, the First Amendment also protects individual expression as a means of self-fulfillment. But "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also, e.g.*, J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 633 (1982) ("Political discussion is indeed at the core of the first amendment's guarantees, but the very centrality of political speech calls for a thorough rather than a conclusory analysis.").

U.S. at 26–27, for representative government cannot function if the prospect of financial gain leads elected officials to abandon the obligations of their office, *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497 (describing corruption as a "subversion of the political process"), *cited affirmatively in McCutcheon*, 134 S. Ct. at 1460–61. As noted in a 1961 conflict-of-interest case, "no man may serve two masters, a maxim which is especially pertinent if one of the masters happens to be economic self-interest." *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961)(citation omitted). Democracies depend on the people's faith in their government, "and that faith is bound to be shattered when high officials engage in activities which arouse suspicions of malfeasance and corruption." *Id.* at 563; *see also Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 40 (Bicentennial ed. 1987) (noting James Wilson's comment that "[n]o government could long subsist" without the confidence of the people).

All of these values are at stake here, where an elected official was convicted of using the authority and prestige of his office to advance a major benefactor's private business concerns. Given how challenging they can be to enforce, expansive criminal bribery statutes may not always be the best mechanism for deterring such official misconduct.[6] But to allow that there could be better ways for the law to respond to

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[6] This is one reason that we support other robust safeguards, including ex ante limits on both personal gifts and political spending, and transparency measures. *See, e.g.*, Brennan Ctr. for Justice, *Democracy Agenda: Money in Politics* (Feb. 4, 2015), https://www.brennancenter.org/analysis/democracy-agenda-money-politics.

McDonnell's actions is a far cry from concluding that his behavior actually enjoys constitutional *protection*.

In short, interpreting the First Amendment as protecting more than the general "ingratiation and access" occasioned by supportive speech—including interpreting it to grant protection to self-dealing by elected officials—disrupts "the very means through which a free society democratically translates political speech into concrete governmental action." *McConnell*, 540 U.S. at 137) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)), *overruled in part on other grounds by Citizens United*, 558 U.S. 310. If we leave even "the *perception* of [such] impropriety unanswered, the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri*, 528 U.S. at 390 (emphasis added). When, as a result, there is no longer a "link between political thought and political action, a free marketplace of political ideas loses its point." *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting). That is the risk this Court will run if it holds that McDonnell's actions enjoy First Amendment protection.

CONCLUSION

Almost 250 years after the Framers began the project of building a democracy responsive to the people, McDonnell asks the Court to construe its past cases to create a First Amendment right to rent the prestige and authority of his office to an affluent benefactor. When public confidence in government is near record lows and an overwhelming majority of Americans be-

lieve that money plays a dominant role in our politics,[7] this would be a perilous road to take. We respectfully ask the Court to clarify that it never intended to provide constitutional protection for conduct that undermines the integrity of our political system, and will not do so now.

Respectfully submitted,

DANIEL I. WEINER
BRENT FERGUSON
BRENNAN CENTER FOR JUSTICE AT THE NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(646) 292-8383

SCOTT A. EISMAN
Counsel of Record
MADELINE R. SNIDER
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 230-4635
scott.eisman@freshfields.com

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[7] *See Pew Research Center, Public Trust in Government 1958-2015*, Nov. 23, 2015, http://www.people-press.org/2015/11/23/6-perceptions-of-elected-officials-and-the-role-of-money-in-politics/; Nick Gass, *Majority of Americans Think Money Plays Too Big a Role in Politics*, Politico, June 2, 2015, http://www.politico.com/story/2015/06/poll-money-in-politics-influence-118534 (citing *New York Times*/CBS poll in which 84% of respondents said money plays too great a role in American politics).